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Supreme Court of the United States

October Term, 1929

No. 57

STORY PARCHMENT COMPANY,
Petitioner

v.

THE PATERSON PARCHMENT PAPER COMPANY
and
KALAMAZOO VEGETABLE PARCHMENT COMPANY
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

EDWARD F. McCLENNEN
JOSEPH M. DOHAN
For Respondents.

March 14, 1930.

TABLE OF CASES

PAGE

American Sea Green Slate Co. *v.* O'Halloran, 229 Fed. 77 4

Central Coal & Coke Co. *v.* Hartman, 111 Fed. 96 . . . 4

Chicago Life Ins. Co. *v.* Tiernan, 263 Fed. 325 4

Keogh *v.* Chicago & Northwestern Ry. Co., 260 U. S. 156 . . . . . 4, 5

Keystone Mfg. Co. *v.* Adams, 151 U. S. 139 4

McCornick *v.* U. S. Mining Co., 185 Fed. 748 4

Northern Ry. Co. *v.* Page, 274 U. S. 65 . . . . . 5, 9

Sussex Land & Live Stock Co. *v.* Midwest Refining Co., 276 Fed. 932 4

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BRIEF FOR RESPONDENTS

The petition of the plaintiff Story Parchment Company for certiorari, should be denied because: —

1. There are no special or important reasons for exercising the sound judicial discretion to grant this writ in this case.

2. There is no evidence that the plaintiff was injured by the acts of the defendants.

3. The plaintiff has had a trial by jury which has resulted in a verdict for the defendants which calls for judgment for the defendants.

4. There is no evidence that the defendants' acts were a combination to monopolize or to restrain trade.

1. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR EXERCISING THE SOUND JUDICIAL DISCRETION TO GRANT THIS WRIT IN THIS CASE.

The decision of the Circuit Court of Appeals for the First Circuit January 23, 1930 is not in conflict with the decision of any other Circuit Court of Appeals. It is not a decision on any question of local law. It is not a decision on a question of general law. On the contrary, it is a decision concerning the absence of evidence in the particular case. It is not an untenable decision. It is not in conflict with the weight of authority. On the contrary, a decision for the plaintiff would be in conflict with the weight of authority and with the principles already settled by the decisions of the Circuit Courts of Appeal and of this Court. The decision is not a decision on an important question of federal law. It is not a departure from the accepted and usual course of judicial proceedings. (Rules of June 5, 1928, No. 38, Paragraph 5, p. 31.) In short, it is a right decision on the evidence presented in the particular case.

2. THERE IS NO EVIDENCE THAT THE PLAINTIFF WAS INJURED BY THE ACTS OF THE DEFENDANTS.

The plaintiff has suffered the consequences of attempting to enter an overcrowded industry with insufficient capital. Not only is this unanswerably shown by the evidence introduced by the plaintiff, but also there is no evidence whatever that the plaintiff's losses flowed from a combination of the defendants even if it be assumed that there was such a combination.

The plaintiff claims that its losses were due to a combination of the defendants to reduce prices.

If the plaintiff was injured by a reduction of prices, it was injured by its own reduction of its own prices and not by a combination of the defendants to reduce the defendants' prices.

There is no evidence whatever that the *plaintiff* in the effort to get trade would not have reduced prices just as much as it did reduce them even if the defendants had not combined to reduce prices.

There is no evidence whatever that the *defendants severally*, in their effort to meet the plaintiff's competition, would not have reduced prices just as much as they did reduce them even if the defendants had not combined.

There is no evidence whatever that if the plaintiff had not reduced prices the plaintiff would have succeeded in business or that it would have avoided the insolvency and cessation of business which it encountered.

There is no evidence whatever as to what amount of goods the plaintiff would have sold if the plaintiff had not reduced its prices.

The inevitable logical conclusion from the evidence which was introduced, that the plaintiff would not have succeeded, adds emphasis to the total absence of any evidence to the contrary. This is emphasis only. The controlling fact is the absence of any evidence to support the plaintiff's contention.

The plaintiff, ignoring this lack of evidence, contends for two elements of damages, namely, (1) the difference between the amount which the plaintiff received for its parchment and the amount which it would have received

for this parchment if it had sold this parchment at the prices at which the defendants were selling before the reductions and in the claimed amount of $20,000, and (2) the difference between the value of its plant which had cost $235,000, and the estimated value of this plant when this suit was begun June 3, 1928, $75,000. If no one of these two items in some ascertainable amount was proved as the incurrence due to a combination of the defendants, no injury to the plaintiff was shown.

It is a guess, only, and an impossible one even so, that these losses resulted from the combination.

A guess, however probable, is not enough. Damages resulting from the defendants' unlawful acts and in an amount susceptible of expression in figures proved by facts from which their existence is logically and legally inferable and not supplied by conjecture, is an essential element of a cause of private action under the Anti-Trust Acts.

> *Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U. S. 156, 165, Semble.
> *American Sea Green Slate Co.* v. *O'Halloran*, (C.C.A. 2d), 229 Fed. 77, 80.

What larger sum the plaintiff would have made between November 1, 1927, when it began business, and September 1, 1928, when it had ended, if conditions had been different from what they were, is too speculative to warrant a recovery.

> *Two cases just cited.*
> *Sussex Land & Live Stock Co.* v. *Midwest Refining Co.*, (D. C. Wyo.) 276 Fed. 932.
> *Chicago Life Ins. Co.* v. *Tiernan* (C.C.A. 8th) 263 Fed. 325.
> *McCornick* v. *U. S. Mining Co.* (C.C.A.8th) 185 Fed. 748.
> *Central Coal & Coke Co.* v. *Hartman*, (C.C.A.8th) 111 Fed. 96.

The fact that one manufacturer could make profits in a given line of business is not evidence that another in the same line with equal advantages would do so.

> *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139.

Disbelief of evidence is not proof of the contrary.

Northern Railway Co. v. *Page*, 274 U. S. 65, 75.

As to the two elements claimed, there was a total absence of evidence of the essentials following: —

(1) There is no evidence that the plaintiff could have sold the same amount of goods at the higher prices. It is inconceivable that the plaintiff could have sold exactly the same amount of goods at the higher prices. There is no evidence of what amount it could have sold. There is nothing on which to base a guess.

(2) There is no evidence that the plaintiff would not have reduced its prices somewhat and even as much as it did, if the defendants had not combined. On the contrary, on the plaintiff's own evidence, for the purpose of getting trade the plaintiff had made its own discounts, concessions, reductions and cuts before those made by any of the defendants and plaintiff continued to make them thereafter.

(3) There is no evidence that the plaintiff's reduction of prices was due to the defendants' combination. The plaintiff's own evidence shows the contrary, and that the plaintiff led the field over the declivity.

(4) There is no evidence that even if the plaintiff's reductions were due to the defendants' reductions, they, in turn, were due to the defendants' *combination*. On the contrary, when the plaintiff, according to its own evidence, started the price war, it is incontrovertible that each defendant for its own preservation would have made the reductions even if they had not combined to do so.

(5) There is no evidence that prices will not be reduced by competitors even if the prices theretofore are reasonable. (*Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 161.) In the price war which the plaintiff projected, the probability that the reductions would have been made, adds emphasis. Combination may be thought a necessary protection for an increase of prices whereby one of the combiners might otherwise lose trade to the other. No such protection by com-

bination is required for the safe reduction of prices. Properly analyzed, plaintiff's contention really is that it had acquired a vested right (R. 618) to have the defendants continue to combine to keep up prices.

(6) There is no evidence of any damage except that "the plaintiff had sustained a loss as a result of its unsuccessful attempt to break into the vegetable parchment industry." (R. 598)

(7) There is no evidence of what the plaintiff's plant would have been worth June 3, 1928 if the defendants had not combined, and, therefore, no evidence of the diminished value of that plant because of any combination. This is true even if it be assumed that the cost of $235,000 measured its value to a prosperous concern and that $75,000 measured its value to a dying concern.

(8) There is no evidence that the plant would have been worth more than $75,000 to a dying concern.

(9) There is no evidence that the plaintiff could have survived under any circumstances. On the contrary, the plaintiff's evidence showed no prospect of success. At best, plaintiff's business did not exceed one-half its capacity (R. 560). There is no evidence that the plaintiff's bulk of business was diminished by reductions in prices because the plaintiff's evidence is that the plaintiff met the reductions and did so before they were made and so lost no trade because of keeping up prices. There is no evidence that if the plaintiff had done the same bulk of business at the old prices the plaintiff's gross return would have been increased more than the $20,000 above claimed.

(10) There is no evidence that $20,000 would have been enough to save the plaintiff from financial disaster. The plaintiff's own evidence showed the contrary. The plaintiff's entire capital was $204,000 (R. 547, 578). The plaintiff's plant cost $235,000 (R. 563), or more than $30,000 in excess of the plaintiff's capital. Therefore the plaintiff's working capital was a deficit of $30,000. By the Fall of 1928 the plaintiff was a judgment debtor for $135,000 (R. 593). There is no evidence that $20,000 more gross income would have saved this situation.

(11) There is no evidence that in June, 1928, under any circumstances there would have been a prosperous concern available to use the plant.

(12) There is no evidence that under any circumstances the plant would have had a market value in excess of $75,000 in June, 1928. Three-fourths of the expense for this plant was for machinery and equipment for this specialty (R. 579).

(13) There is no evidence that the plaintiff sustained any loss except the natural consequence of an attempt to go into an overcrowded industry where there was no prospect of success (R. 522, 583).

(14) There is no evidence that the plaintiff's loss did not result solely from an unwise investment.

(15) There is no evidence that the plaintiff could have made a financial success.

(16) There is no evidence that the plant which the plaintiff has, is not just as valuable as it ever was.

(17) There is no evidence that the reductions in prices were not the natural consequence of the plaintiff's act when "its first effort to obtain trade was to deal direct with the large packers and jobbers and offer a five per cent. discount on the prices then offered by the defendants" (R. 615).

(18) There is no evidence that the plaintiff's loss was not due to the fact that, although the plaintiff or those who organized it knew (R. 615) when it entered the field that there were only three manufacturers in the field who sold at a uniform price and that there was an overcapacity and no prospective increase in demand in excess thereof, they entered the field with a price-cutting war which would inevitably bring price reductions by competitors whether they combined or not.

(19) There is no evidence that the plaintiff's losses, however described, were anything but a failure to get larger future improbable profits from the hoped-for operations of a business which never was established and had no experience measurement.

(20) There is no evidence that if there was no combination, the existing prices would have remained stable or even reasonable under the onslaught of the plaintiff's price-cutting competition.

(21) There is no evidence that each defendant would not, independently of the other, under the rule of self preservation, have reduced prices to meet the plaintiff's competition as much or more than they were reduced.

(22) There is no evidence that lifts the relation between the plaintiff's loss and the combination of the defendants above an impossible guess.

3. THE PLAINTIFF HAS HAD A TRIAL BY JURY WHICH HAS RESULTED IN A VERDICT FOR DEFENDANTS WHICH CALLS FOR JUDGMENT FOR THE DEFENDANTS.

The plaintiff introduced before a jury all the evidence that there was to show that the defendants were liable. That evidence was, as matter of law, insufficient to show any liability on the part of the defendants. Therefore, the defendant is entitled to a verdict. Under these circumstances, and expressly, "the jury find for the defendant" (R. 13).

The Constitution does not give a right to two jury trials.

When a jury has found for the defendant, the proper order is a judgment for the defendant.

In *Northern Ry. Co.* v. *Page*, 274 U. S. 65, judgment had been ordered for the defendant on an alternative verdict (67). In the case at bar, the District Court should have made the same order. In the case cited the Circuit Court of Appeals vacated the order and directed judgment for the plaintiff (68). This Supreme Court reversed that judgment (75). The case went to judgment for the defendant. The decision is a conscious one (67) that inasmuch as under the circumstances the jury has given a verdict for the defendant, judgment should be entered for the defendant.

4. THERE IS NO EVIDENCE THAT THE DEFENDANTS' ACTS WERE A COMBINATION TO MONOPOLIZE OR TO RESTRAIN TRADE.

The decision of the Circuit Court of Appeals is that on the evidence the plaintiff was not entitled to a verdict. The stated basis for this is that the plaintiff has not proved any damages resulting from the defendants' acts. The decision is right, also because the plaintiff's evidence does not establish that the defendants combined to restrain or to monopolize trade. The Circuit Court of Appeals in its opinion decides this question adversely to the defendants. It is respectfully submitted that it should be decided otherwise.

The record is an extensive one. As brief a comprehensive statement of all the evidence as can be made, is contained in the brief for the defendants in the Circuit Court of Appeals, pages 7 to 41 inclusive. These pages are filed herewith. If the Court is not convinced that the petition for certiorari should be denied for the reasons stated in the foregoing sections 1 and 2, the defendants respectfully request the Court's consideration of these pages 7 to 41 inclusive supporting this additional reason for which there should be a judgment for the defendants, namely, that there is no evidence, sufficient to go to a jury, that the defendants combined to monopolize or to restrain trade.

Respectfully submitted,

EDWARD F. McCLENNEN

JOSEPH M. DOHAN

Attorneys for Respondents.